

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

75-7437

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 75-7437

----- X

SHIRLEY HERRIOT BROOKS, GLORIA JONES,
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

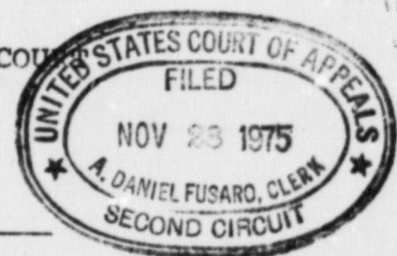
- against -

FLAGG BROTHERS, INC., individually and as
representative of a class of all others
similarly situated, HENRY FLAGG, individually
and as President of Flagg Brothers, Inc., THE
AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF
NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW
YORK, and LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York,

Defendants-Appellees.

----- X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SUPPLEMENTAL APPENDIX

The Legal Aid Society of Westchester County
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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-and-

GLORIA JONES,

Plaintiff-Intervenor,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of FLAGG
BROTHERS, INC.,

Defendants,

-and-

THE ATTORNEY GENERAL OF THE STATE OF NEW
YORK; THE AMERICAN WAREHOUSEMEN'S ASSO-
CIATION; THE INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC.; THE WARE-
HOUSEMEN'S ASSOCIATION OF THE PORT OF NEW
YORK; and THE COLD STORAGE WAREHOUSEMEN'S
ASSOCIATION OF THE PORT OF NEW YORK,

Defendant-Intervenors.
-----x

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am counsel to the Warehousemen's Association of the
Port of New York, Inc., and the Cold Storage Warehousemen's
Association of the Port of New York, Inc., defendant-intervenors,

and I am a member of the bar of the within Court.

I submit this affidavit on behalf of the above mentioned defendant-intervenors in opposition to plaintiffs' motion for summary judgment.

I have been associated with the commercial public warehouse industry since March of 1946, not only as counsel to the Warehousemen's Association of the Port of New York, Inc., but as counsel to many individual commercial warehouse proprietors. My involvement with the industry has not only been of long duration, but it has been of an in-depth nature. I am, therefore, personally knowledgeable as to the facts hereinafter stated.

PRELIMINARY STATEMENT

The principal relief sought by plaintiffs is a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. The predicate for the relief sought by plaintiffs is that under the unique circumstances spelled out in the pleadings and in plaintiffs' supportive affidavits, their constitutional rights were violated by the assertion on the part of the defendant, Flagg Brothers, Inc. of its rights under the U.C.C. warehouseman's lien sections, supra. However, plaintiffs are not content with an adjudication of their rights; they go considerably further and demand that the Court declare these U.C.C. lien sections unconstitutional.

In view of the broad and sweeping nature of the relief demanded by plaintiffs herein, this Court granted leave to the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York, as well as to the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. to intervene as defendants. The Court also granted leave to the Attorney General of the State of New York to intervene as a defendant upon the ground that the constitutionality of a State legislative enactment was under attack.

The Warehousemen's Association of the Port of New York, Inc. is a not-for-profit corporation of the State of New York. Its membership consists of a large number of commercial public warehousemen doing business in the City of New York and in the metropolitan New Jersey area. These members are in the business of storing, handling and distributing merchandise, commodities and materials of every conceivable character and description. Their establishments are frequently referred to as "dry" warehouses as distinguished from "cold storage" warehouses.

The Cold Storage Warehousemen's Association of the Port of New York, Inc. is an unincorporated association whose members do business in the same territory, but their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their preservation and storage. Their establishments are frequently referred to as "cold storage" warehouses.

Both of the aforesaid defendant-intervenors store, handle and distribute goods, wares, merchandise, materials and commodities almost exclusively for and on behalf of merchants and other commercial and business establishments engaged in inter-state and international commerce. Their members are, accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (shippers) of the said defendant-intervenors, are importers who store their goods in United States customs bonded facilities maintained by many of them in accordance with the Customs Revenue Laws and Regulations of the United States. These customs bonded warehouses are an indispensable facility for the great importing industry that is so vital to the commerce of the Port of New York. Importers, save for duty-free commodities, such as coffee, as a rule, place their dutiable property in customs bonded warehouses and thereby avoid the financial hardship of immediately liquidating duties on entry. The importers, in this way, may postpone the payment of duties until they are ready either to introduce their imported products into the domestic territory, or re-export them - in which latter event the payment of duties is avoided altogether. Imports are normally and almost routinely placed in various warehouses belonging to the network of customs bonded warehouses (both dry and cold) usually by customs brokers, and the bonded warehouses, also as a matter of normal routine, accept these imported goods for storage in

reliance upon the protection of their warehouseman's lien without which, this flow of international commerce would be so substantially impeded as to effectively put many small or medium-sized importers out of business. It is, therefore, in my judgment scarcely an exaggeration to say that the import industry in the Port of New York might well be destroyed if the warehouseman's lien were to be judicially nullified.

The said defendant-intervenors function on a regional or local level in much the same way as the defendant-intervenors American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc. function on a national level.

For convenient identification, the type of public warehouses represented by the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York, Inc., and their national counterparts, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. will hereinafter be referred to as "commercial warehouses". The principal defendant herein, Flagg Brothers, Inc., although, upon information and belief, presumably, a public warehouse, is ^{upon information and belief,} not a commercial warehouse. Flagg is in the business of conducting what is commonly referred to as a moving and storage business, the thrust of which is to transport and place in dead storage non-commercial articles of personal property consisting mainly of used furniture and household furnishings belonging to the consuming or general public. For purposes of convenient identification, the type of establish-

ments typified by the defendant, Flagg, will hereinafter be referred to as "furniture warehouses".

I

THERE IS A SUBSTANTIAL DISTINCTION BETWEEN COMMERCIAL WAREHOUSES AND FURNITURE WAREHOUSES.

The distinction between commercial warehouses and furniture warehouses relate not merely to the nature and type of property that may be stored and handled, but to the modus operandi of each.

As previously mentioned, commercial warehouses store and handle every conceivable type of merchandise and commodities, both raw materials and manufactured articles. Moreover, commercial warehouses deal not with the general or consuming public, but with the world of business, i.e., manufacturers, distributors, retailers, importers, exporters, commodity exchanges and banking or financial institutions. With regard to the last mentioned category, storage of commercial goods in commercial warehouses is a common and frequent instrumentality for business finance in that warehouse receipts are used by the bailors as collateral security for business loans. Furniture warehouses, on the other hand, deal primarily with the general or the consuming public rather than with business and industry.

In the commercial warehouse sphere, storage per se is only one facet of the business. Distribution, filling orders (e.g., handling mail order activities), maintaining inventories, inventory controls, and even processing, are part and parcel of the commercial warehouse industry. In the furniture warehouse,

typically, the furniture or other household furnishings are placed in what is known as dead storage for safekeeping with little handling activity involved save for the deposit of the goods initially and the withdrawal of the goods upon the expiration of the term of storage.

The most significant distinction, however, between storage in commercial warehouses and the type of furniture warehouse storage involved in the case at Bar, lies in the manner in which the relationship comes into being in each situation. In the case at Bar, there is a sharp issue on this very question. The defendant, Flagg, contends that the storage of plaintiffs' goods came about with the knowledge and consent of the plaintiffs. The claim, however, of the plaintiffs is that the storage of the goods and the rates charged therefor were unilaterally imposed upon plaintiffs and, therefore, it could not be said that a bailment contract was voluntarily entered into between these parties. This type of a relationship is unheard of in the commercial warehouse industry. The invariable practice and procedure is for the owner of the goods or the authorized agent of the owner of the goods to deposit the same in the warehouse and otherwise to enter into the contractual relationship of bailment, so that what emerges is a true bilateral contract of bailment.

That there is a substantial distinction between the two types of warehousing is manifest in one of the very sections here under attack, namely, Section 7-210 of the U.C.C. which

deals with the enforcement of the warehouseman's lien. This section has two main sub-divisions, sub-division (1) which provides for a public or private sale; and sub-division (2) which provides for a public sale. Sub-division (2) states that: "A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows: * * * ". (underscoring added).

II

IN VIEW OF THE SUBSTANTIAL DIFFERENCES BETWEEN COMMERCIAL WAREHOUSING AND FURNITURE WAREHOUSING, IT WOULD BE INAPPROPRIATE FOR THE COURT TO DECLARE THAT SECTIONS 209 and 210 OF THE U.C.C. ARE UNCONSTITUTIONAL BASED UPON THE FACTS INVOLVED IN THE RELATIONSHIPS BETWEEN THE PLAINTIFFS AND THE DEFENDANT, FLAGG.

At the very most, if the Court should be persuaded that plaintiffs' rights have been impaired, the Court might be justified in holding not that Sections 7-209 and 7-210, U.C.C. are unconstitutional, but that plaintiffs were denied their due process. However, plaintiffs are not, or at least do not seem to be satisfied with such an adjudication, or, for that matter, with any adjudication that would afford them a complete and adequate remedy. They insist upon creating a cause celebre by having the Court go the whole way and declare the statute unconstitutional on its face in utter disregard of the far-reaching, dire consequences mentioned below.

It goes without saying that the constitutional issues herein presented should not be weighed in a vacuum. The practical consequences of acceding to the extravagant demands

of the plaintiffs are relevant for if Section 7-209 and 7-210 of the U.C.C. are declared unconstitutional as demanded by plaintiffs, the consequences not only to the commercial public warehouses, but to the whole of national and international trade and commerce would be devastating. The Court, is, therefore, respectfully cautioned to take heed of these possible consequences. It is reasonable to anticipate that the free flow of goods in commerce would be impeded. From time immemorial, public warehousemen's dependence upon the security of the warehouseman's lien has been the sine qua non of their operations. They readily take into their establishments for storage goods of every description from all types of bailors. Without the lien, commercial warehousemen would, of necessity, be required to be selective and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. It is, therefore, not difficult to envision the magnitude of the curtailment and destruction of trade, commerce and industry if the lien were nullified, bearing in mind the extent to which commercial activities depend upon the facilities of commercial warehousemen.

The drastic and extravagant remedy of a declaration of constitutional invalidity is neither necessary nor even essential to the protection of plaintiffs' rights, and great care should be taken by the Court to limit the application of any judicial

declaration to the facts and circumstances of the case at Bar and not to Sections 7-209 and 7-210, of the U.C.C., on their face.

III

PLAINTIFF HAS FAILED TO STATE A FEDERAL CAUSE OF ACTION AND THIS COURT IS, ACCORDINGLY, WITHOUT JURISDICTION.

The statutory warrant for this action is 42 U.S.C. Section 1983. However, in order that an action under this Section may be sustained, a showing that action by the State of New York is involved is mandatory. Plaintiffs have failed in such a showing.

Plaintiffs' argument that the imposition and execution of the warehouseman's lien constitutes State action so as to give this Court jurisdiction is inconsistent with the recognition throughout plaintiffs' brief that the warehouseman's lien, as such, existed under common law. Under these circumstances, the claim that Section 7-209 of the U.C.C. which in essence declares that the warehouseman has a lien is really not under attack. Actually, the only section that the plaintiffs are attacking is Section 7-210 which deals with the enforcement of the warehouseman's lien and which, according to the plaintiffs, involves State action. To support this argument, plaintiffs have urged that in enforcing their lien, warehousemen perform functions that are ordinarily performed by public officials, such as a sheriff. It is quite clear that the warehouseman's lien type situation is a great deal closer to those which the various

decisions cited have found that State action is not involved because there is no delegation of the traditional State power granted to any person or to any official. It is almost absurd to predicate a claim that State action is involved on the ground that a largely substantive State statute is also involved. Further, not only the lien, but the method of enforcement of the lien are not dependent upon statute. It has previously been pointed out that plaintiffs concede that the lien existed under common law. In addition, the right to enforce the lien is not wholly dependent upon the statute, but may be predicated upon a contract between the bailor and the bailee. There is nothing governmental or public about the lien or its enforcement. It is essentially a private transaction and a private activity in which the State plays no role whatsoever procedurally. The only involvement of the State is in its purely legislative function in having enacted a statute that prescribes a substantive right and a means of enforcing that right which could be created by contract even in the absence of the statute. There are no State regulations; there are no administrative agencies involved; there are no public officials who are clothed with authority to take action. As already stated, what we have here is a strictly private-type transaction that existed under common law and that can be created by contract. Under these circumstances, State action is not involved and an essential element of this Court's jurisdiction is, therefore, lacking.

IV

THERE ARE TRIABLE ISSUES OF FACT PRESENTED WHICH SHOULD BE SUBMITTED FOR DETERMINATION IN A STATE FORUM. SUMMARY JUDGMENT IN A FEDERAL COURT IS SINGULARLY INAPPROPRIATE.

Plaintiffs claim that they were involuntarily hoodwinked into going along with the warehousing of their property. Defendant, Flagg, claims that the warehousing relationship came into being with the knowledge and consent of the plaintiffs and the result was a bilateral bailment contract. This is the principal issue presented, the resolution of which involves a determination of credibility and all of the other factors that can be deduced only from the kind of evidence presented at a trial in a State court, and not from the summary statements imparted by affidavit and memoranda in a motion for summary judgment in a Federal Court.

To repeat, the rights and corresponding obligations as between these principal parties can, and indeed should be determined by individual suits in State courts of appropriate jurisdiction. All appropriate remedies are readily available thereby.

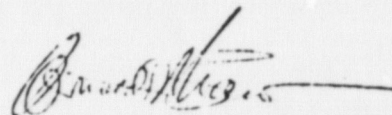
V

CLASS ACTION STATUS IS NOT INDICATED.

Class action status is neither warranted nor justified. The substantial differences between commercial warehouses and furniture warehouses, as above delineated, and the unique circumstances surrounding the transactions between plaintiffs and the defendant, Flagg, strongly militate against class action treatment. Class action status, if any, should be confined to the

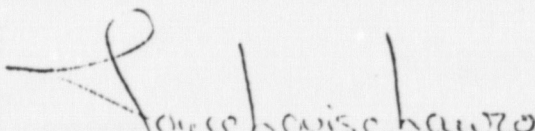
type of establishment represented by the defendant, Flagg, as well as the aforesaid unique circumstances, i.e., removal of furniture and household furnishings by a City marshal or similar officer pursuant to a judgment of a State court, and the placing of such goods in a public warehouse. Similar circumstances, to the best of my knowledge, never arise in the commercial warehousing industry.

It is respectfully submitted that the within motion be denied, and that the complaints herein be dismissed.



ARNOLD H. SHAW

Sworn to before me this
16th day of October, 1974.


NOTARY PUBLIC

JOYCE LOUISE LAURO
Notary Public, State of New York
No. 24-2271225
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY HERRIOT BROOKS, et al.,

Plaintiff s

against

FLAGG BROTHERS, et al.,

Defendant s

Index No. 75-7437

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Pleasantville, New York Highview Terrace,

That on the 14th day of November

19 75 deponent served the annexed

Supplemental Appendix

on Norman Weiss & Arnold Shaw

attorney(s) for Defendants

in this action at 2 West 45th St., N.Y., N.Y. & 51 Madison Ave., N.Y., N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — ~~post office~~ — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me

this 14 day of November

19 75

The name signed must be printed beneath
Kitty Leah Huebbe

MARTIN A. SCHWARTZ

Notary Public, State of New York

No. 03-3555455

Qualified in Bronx County

Certif. filed in New York County
Commission Expires March 30, 1971

Index No.

against

Plaintiff

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

SS.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for*

*That on the day of 19 deponent served the annexed
on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.
Dated this day of 19

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY HERRIOT BROOKS, et al.,

Plaintiff S

against

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on A.Seth Greenwald & Alvin Altman
attorney(s) for Defendants

in this action at Two World Trade Center, N.Y., N.Y. & 1776 Broadway, N.Y., N.Y.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a ~~post office~~ official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this

day of November
MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-355455

Qualified in Bronx County

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Kitty Leah Huebbe

The name signed must be printed beneath

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against

Plaintiff

Defendant

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STATE OF NEW YORK, COUNTY OF

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Dated this day of 19

The name signed must be printed beneath

Attorney at Law



